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Experts disagree with jury verdict against woman in boy's drowning

Wednesday, October 05, 2005

By Paula Reed Ward, Pittsburgh Post-Gazette

Standing along the bank of a rain-swollen creek, Susan Newkirk watched as the 2-year-old boy tumbled in and was swept away.

She couldn't swim. Instead of diving into the raging waters after her friend's son, she yelled to his father for help.

The little boy died.

Certainly, her defense attorney argued during her trial for endangering the welfare of a child, his client had a moral obligation to try to save the boy. But, he continued, she did not have a legal one.

The jurors judging Ms. Newkirk's case obviously disagreed when they convicted her in July. Last week, the Hollidaysburg woman was sentenced to up to 18 months in jail.

But legal experts disagree with the verdict.

Instead, they say Ms. Newkirk did not have a "duty of care" to the little boy because she had no special relationship with him.

Her public defender, David Beyer, has vowed to appeal her conviction, arguing that she was not the child's parent or baby sitter, and therefore had no duty to protect him.

On Sept. 18, 2004 -- the day after Hurricane Ivan brought torrential downpours across Western Pennsylvania -- Ms. Newkirk, 41, joined her friend, Thomas E. Reffner, and his 2-year-old son, Hunter Delasko, to do repairs to a trailer in Claysburg, Blair County.

While Mr. Reffner worked on the trailer, Ms. Newkirk walked along South Poplar Run Creek.

She told police that Hunter had been with her and almost fell in. At that point, Ms. Newkirk took the boy back to his father, telling Mr. Reffner that Hunter should not be by the water.

A short time later, the toddler rejoined Ms. Newkirk.

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"The little boy walked down to her," Mr. Beyer said.

As he was throwing sticks and stones into the water, Hunter fell in.

"She had no legal duty to go in and save this child," Mr. Beyer said. "If a person is not a parent or guardian, then they owe no duty to that child."

But Blair County District Attorney Dave Gorman said she was, at that moment, the child's guardian.

"Common sense dictates someone in that close proximity to a child is obligated to do something," Mr. Gorman said. "I think anybody in their right mind would jump in."

Both the defense and prosecution agree that Mr. Reffner never specifically asked Ms. Newkirk to watch his son. But the district attorney doesn't think that matters.

"If she didn't believe she had a legal duty, then why did she pull the kid back the first time?" Mr. Gorman asked.

Had Ms. Newkirk left the trailer after returning Hunter to his father, she would have fulfilled her obligation, and there would have been no charges, the prosecutor said.

"It's not just the fact she didn't go in after the kid," Mr. Gorman said. Even having a child that close to a raging stream violates a duty to care, he continued.

As for Ms. Newkirk's argument that she couldn't swim, Mr. Gorman didn't think it was relevant. Two passers-by went into the creek to try to save Hunter after he'd fallen in, and one of them also couldn't swim. One man was able to reach Hunter, but the boy slipped from his grasp before he could pull him to safety, Mr. Gorman said.

David Herring, a professor of child welfare law at the University of Pittsburgh, said there is no Good Samaritan law in Pennsylvania.

"You can't ask them to have to sacrifice their own lives," Mr. Herring said. "That's quite a stretch to impose that duty on her."

He called the case against Ms. Newkirk an "aggressive prosecution."

"The father's the one the law should be holding responsible," he said.

Mr. Reffner was charged, but he pleaded guilty to a lesser charge -- reckless endangerment. He was offered probation to testify against Ms. Newkirk. The prosecution, however, never called Mr. Reffner to the stand. Mr. Gorman said his testimony wasn't necessary.

As for the plea agreement, the district attorney said he wasn't sure a jury would have convicted him.

"I'm not saying in any way, shape or form Mr. Reffner isn't culpable," the prosecutor said. "I think there was an issue as to whether a jury would have returned a guilty verdict on [him]."

But Kirk Henderson, an assistant public defender for Allegheny County, said that's not a valid justification for the lesser charge.

"A parent has the ultimate responsibility," he said.

Under the current case law, charging Ms. Newkirk should have come down to whether she was aware of the duty to the child, Mr. Henderson said. He didn't buy the district attorney's argument that Ms. Newkirk recognized her duty when she returned Hunter to his father the first time.

"I don't think that one time, telling a child what to do invests that person with responsibility," Mr. Henderson said.

"People have their own choices they have to live with, but that doesn't make it criminal."

Mr. Beyer agrees.

"The jury wanted someone to pay for this little boy," he said. "I can understand from a moral perspective, we all think something different should have happened here. That doesn't mean she's guilty of a crime."

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